MAR 11 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1368

THE NATIONAL CASH REGISTER COMPANY,
Petitioner,

vs.

NCR EMPLOYEES' INDEPENDENT UNION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. MACK SWIGERT
600 Dixie Terminal Building
Cincinnati, Ohio 45202
Attorney for Petitioner

Of Counsel:
B. LYLE SHAFER, ESQ.
RICHARD V. RUNYAN, ESQ.
LAWRENCE J. BARTY, ESQ.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Opinion Below 1
Jurisdiction 2
Question Presented 2
Statute Involved 2
Statement 2
Reasons for Granting the Writ 8

1. The Court Below Has Decided Federal Questions in a Way in Conflict with Applicable Decisions of This Court 8

   a. Under Decisions of This Court, the Cause Should Be Dismissed 8

   b. If the Court Below Had Authority to Order Arbitration, It Erred in Forbidding the Arbitrator to Hear and Decide "Contractual Time or Other Procedural Limitation" Issues 11

2. There Is a Conflict Among the Circuits 16

Conclusion 18

Appendix A—Opinion and Judgment, United States Court of Appeals for the Sixth Circuit A1

Appendix B—

29 U.S.C. §185(a) A5
29 U.S.C. §173(d) A5

Appendix C—Memorandum Opinion and Order, United States District Court, Southern District of Ohio, Western Division A7

Table of Authorities

CASES

Brass & Copper Workers Union v. *American Brass Co.*, (CA 7; 1959) 272 F. 2d 849 11

Federal Trade Commission v. *American Crayon Co.*, (1956) 352 U.S. 806 18
International Association of Machinists v. *Howmet Corp.*, (CA 9; 1972) 466 F. 2d 1249 16
John Wiley & Sons, Inc. v. *Livingston*, (1964) 376 U.S. 545 ..... 8, 10, 11, 12
Local 748 v. *Jefferson City Cabinet Co.*, (CA 6; 1963) 313 F. 2d 231 11
Operating Engineers v. *Flair Builders*, (1972) 406 U.S. 487, 32 L.Ed. 2d 248 ..... 12, 13
Republic Steel Corp. v. *Maddox*, (1965) 379 U.S. 650 10
Steelworkers v. *American Mfg. Co.*, (1960) 363 U.S. 564 ..... 9, 13, 15
Steelworkers v. *Enterprise Wheel & Car Corp.*, (1960) 363 U.S. 593 13
Steelworkers v. *Warrior & Gulf Navigation Co.*, (1960) 363 U.S. 574 ..... 8, 13
Tobacco Workers v. *Lorillard Corp.*, (CA 4; 1971) 448 F. 2d 949 16
Trailways, Inc. v. *Motor Coach Employees*, (CA 1; 1965) 353 F. 2d 180 16

STATUTES

Section 203(d), Labor Management Relations Act, 1947, 61 Stat. 154, 29 U.S.C. §173(d) 9
Section 301(a), Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. §185(a) 2
28 U.S.C. §1254(1) 2

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

THE NATIONAL CASH REGISTER COMPANY,
Petitioner,

vs.

NCR EMPLOYEES' INDEPENDENT UNION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, The National Cash Register Company (herein "NCR"), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on December 18, 1973.

OPINION BELOW

The opinion of the Court of Appeals is officially reported in ..... F. 2d ....., and appears herein as Appendix A at p. A1.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1973. (Appendix A, *infra*, p. A5) This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTION PRESENTED

When the parties to a collective bargaining agreement have expressly agreed that a grievance is "considered settled" unless appealed by the Union through "written notification" and that "where arbitrability such as timeliness is at issue, the arbitrator will hear evidence and argument on that issue, and decide that issue first", did the Court below err in ordering the parties to proceed to arbitration of grievances on the merits in the absence of "written notification" and "without regard to any possible contractual time or other procedural limitations"?

STATUTE INVOLVED

This case involves Section 301(a) (29 U.S.C. §185(a)) of the National Labor Relations Act, as amended. The relevant statutory provisions are set forth in Appendix B, *infra*, pp. A6-A7.

STATEMENT

The Events Prior to Litigation.

At all relevant times, the NCR Employees' Independent Union (hereinafter "the Union") represented employees of the Petitioner in an appropriate collective bargaining unit in the Petitioner's plant at Dayton, Ohio. On December 16,

1968, the Petitioner and the Union agreed on the provisions of a new collective bargaining agreement following a strike of several weeks duration. As an incident to the settlement, the parties agreed to a temporary work schedule covering the period from December 18, 1968 to January 4, 1969 with a normal work schedule to resume thereafter.

On January 30, 1969, the parties executed their new collective bargaining agreement which was to become effective as of December 18, 1968, and remain in effect by its terms until September 1, 1971. This agreement contained no reference to the temporary work schedule which had expired on January 4.

Article 7 of the new collective bargaining agreement contained an extensive grievance procedure terminating in binding arbitration. Section 7.08.03 provided that:

> "All grievances between the parties as to the interpretation, application or alleged violation of this Agreement, including any supplements thereto, shall be subject to arbitration. The arbitrator shall not have the power to add to or subtract from or modify this Agreement, or any supplements thereto, in any way whatsoever."

Section 7.01 stated:

> "For the purpose of this Agreement, the term 'grievance' shall be defined to mean a dispute between the parties as to the interpretation, application, or alleged violation of this Agreement, including any supplements thereto. If any question arises as to whether a particular dispute is or is not a proper subject for a grievance within the meaning of this Section 7.01, the question may be reserved throughout the grievance procedure and be determined, if necessary, by arbitration."

Section 7.08 provides that a grievance may be appealed to arbitration *only* if "*written notification*" to that effect is given to the Company "*within thirty (30) calendar days* after the Union's receipt of the Company's Step 5 reply to the grievance" and that "*Any grievance not so appealed shall be considered settled on the basis of the reply given at Step 5.*" (Emphasis added)

Section 7.08.04 states that:

> "*Where arbitrability such as timeliness is at issue, the Arbitrator will hear evidence and argument on that issue, and decide that issue first.* Providing the grievance is found to be arbitrable he shall then hear the evidence and argument on the merits, and render his award in writing, within thirty (30) calendar days from the date of the hearing, or within thirty (30) calendar days from his receipt of the briefs, if any, whichever is later." (Emphasis added)

From December 26, 1968 to January 3, 1969, eight grievances were filed under the grievance provisions of the new collective bargaining agreement which, by its terms, became effective December 18, 1968. Each of these grievances claimed a violation by NCR of the terms of the temporary work schedule referred to above. After investigation, NCR, in the final step of the grievance procedure, denied all eight grievances. The Union then advised NCR that it would not appeal any of the eight grievances to arbitration.

The State Court Suit and Removal.

On February 13, 1969, the Union and three employees initiated the instant action by filing a class action in the Court of Common Pleas for Montgomery County, Ohio, on behalf of 12,620 employees in the bargaining unit, seeking

a declaratory judgment as to employee rights under the temporary work schedule. Back pay amounting to several hundred thousand dollars was sought. Arbitration was not requested. NCR removed the action to the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

The Initial Decision of the District Court.

Following removal, NCR filed its motion to dismiss in the District Court, asserting that the parties had agreed that arbitration would be the exclusive remedy for any claimed breach of the collective agreement. The District Court, on January 11, 1971, granted NCR's motion without hearing, treating the motion to dismiss as a motion for summary judgment.

The Initial Decision of the Court of Appeals.

On appeal by the Union, the Court of Appeals for the Sixth Circuit, on April 10, 1972, vacated the order of the District Court and remanded the cause for further hearing. The Court of Appeals held that the District Court had erred in treating NCR's motion to dismiss as a motion for summary judgment without requiring the notice of hearing provided in Rules 12(c) and 56 of the Federal Rules of Civil Procedure. The *per curiam* opinion of the Court of Appeals directed the District Court, if it again concluded that arbitration was respondents' exclusive remedy, to require the parties "to proceed to arbitration on the violation issue rather than dismiss the action outright." In such event, the District Court was also directed to

> "* * * specify the applicable arbitration provision and *its order should direct arbitration of the substantive issue without regard to any possible contractual time or other procedural limitations.*" (Emphasis added)

The Second Decision of the District Court.

On January 16, 1973, the District Court reaffirmed its original conclusion that arbitration was the Respondents' "exclusive remedy." (Appendix C) Acting expressly pursuant to the prior directive of the Court of Appeals quoted above, the District Court ordered:

> "[t]hat the plaintiff Union and the [defendant] Company proceed to submit the dispute concerning the application and interpretation of the 'Work Schedule' without regard to any contractual time or procedural limitation contained in Article VII of the Collective Bargaining Agreement."

The Second Decision of the Court of Appeals.

NCR appealed, challenging (1) the order to arbitrate and, alternatively (2) that part of the District Court's order barring NCR from asserting "contractual time or procedural limitation" in the arbitration proceeding ordered by the Court. The Court of Appeals affirmed this second decision of the District Court, stating:

> "This lawsuit was brought in an atmosphere of confusion as to whether the temporary work schedule was a part of the collective bargaining agreement. Since the schedule related only to a limited period and was not executed at the same point in time as the agreement, the union did not act unreasonably when it concluded that the schedule was not incorporated into the agreement and that its remedy was with the courts, not the grievance procedure. Yet in the course of this lengthy litigation, the period for filing a timely grievance under the agreement expired. We were cognizant of this problem when this case was first before the Court and directed that

should the district court find that the grievance-arbitration procedure controlled, it should not allow the company to foreclose arbitration by asserting that the union's claim was not timely filed. Had we done otherwise, it would have been at the expense of the well-established congressional policy favoring arbitration as a means of preserving union-management peace. *See United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 567-568 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

"Our decision simply means that arbitration remains as a viable means of resolving the dispute. *See generally, Boone* v. *Armstrong Cork Company*, 384 F. 2d 285 (5th Cir. 1967)."

REASONS FOR GRANTING THE WRIT

1. The Court Below Has Decided Federal Questions in a Way in Conflict with Applicable Decisions of This Court.

a. Under Decisions of This Court, the Cause Should Be Dismissed.

It is elementary that:

> "An employer has no obligation to arbitrate issues which it has not agreed to arbitrate." *John Wiley & Sons, Inc.* v. *Livingston*, (1964) 376 U.S. 545, 547.

The Court there also stated:

> "The duty to arbitrate being of contractual origin, a compulsory submission to arbitrate cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." (376 U.S. at 547)

Likewise, in *Steelworkers* v. *Warrior & Gulf Navigation Co.*, (1960) 363 U.S. 574, the Court held that:

> "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (363 U.S. at 582)

It is clear from the language of Section 7 of the collective agreement in the instant case that arbitration was intended by the parties to be the exclusive remedy available with respect to "[a]ll grievances between the parties as to the interpretation, application and alleged violation of this Agreement * * *." It is also undisputed that the Respondents herein elected not to use the arbitration provisions of the agreement for the resolution of the instant

grievances relating to the interpretation, application or alleged violation of the agreement. It is undisputed that before a class action suit for money damages was filed in the state court on February 13, 1969, the Petitioner was advised by the Union that the Union would *not* appeal the grievances to arbitration. Neither the Union nor the Company has requested arbitration of the grievances since that date.

As the parties had agreed that arbitration was to be the exclusive remedy, the District Court acted correctly in initially declining to try the case on the merits and in its implicit rejection of the Respondents' claim for money damages. That is because:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. * * *" Section 203(d), Labor Management Relations Act, 1947, 61 Stat. 154, 29 U.S.C. §173(d).

In *Steelworkers* v. *American Mfg. Co.*, (1960) 363 U.S. 564, the Court, construing the above statute, stated:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator.
>
> * * *
>
> The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." (363 U.S. at 572)

The court below erred, however, when, instead of dismissing the cause, it affirmed the subsequent order of the District Judge referring the cause to arbitration. *Neither party had agreed to arbitrate these grievances.*

Under Section 7.08 of the agreement, only the Union could request arbitration and such a request must be by "written notification to that effect to the Company given within thirty (30) calendar days after the Union's receipt of the Company's Step 5 reply to the grievance." The parties further agreed that:

> "Any grievance not so appealed shall be considered settled on the basis of the reply given in Step 5."

Admittedly the Union gave no such written notification and, under the express language of the agreement, the controversy terminated on the basis of the Petitioner's reply in Step 5. Under these circumstances, the court below should have dismissed the class action for damages instead of referring the merits to arbitration.

In *Republic Steel Corp.* v. *Maddox*, (1965) 379 U.S. 650, an employee sued an employer for money damages in the state court. This Court ordered *dismissal* of the cause because the collective agreement, as in the instant case, contained a grievance procedure terminating in binding arbitration and the plaintiff, Maddox, "made no effort to utilize this mode of redress."

By ordering arbitration of the merits instead of dismissing the cause, the court below clearly violates the precept that "an employer has no obligation to arbitrate issues which it has not agreed to arbitrate", *supra* (376 U.S. at 547), and directed compulsory arbitration without statutory or constitutional authority.

b. If the Court Below Had Authority to Order Arbitration, It Erred in Forbidding the Arbitrator to Hear and Decide "Contractual or Procedural Limitation" Issues.

Before the decision of this Court, in *Wiley, supra*, there was a conflict among the circuits as to whether questions of "procedural arbitrability", such as compliance with grievance procedure time limits, were for the courts to decide or the arbitrator. The leading cases are cited in footnote 12 of the *Wiley* opinion. In *Brass & Copper Workers Union* v. *American Brass Co.*, (CA 7; 1959) 272 F. 2d 849, for example, the Seventh Circuit held that it was for the *Court*, and not an arbitrator, to determine whether a party seeking arbitration had complied with contract time limits. On the other hand, the Sixth Circuit had held, in *Local 748* v. *Jefferson City Cabinet Co.*, (CA 6; 1963) 313 F. 2d 231, that timeliness involved "procedural arbitrability" and, as such, was for decision by an *arbitrator* rather than by the Court.

In *Wiley*, the employer contended that the union had failed to comply with steps of the grievance procedure which, under the language of the agreement, were conditions precedent to arbitration. The employer urged that the question of compliance with these "procedural" conditions must be decided by the court, not an arbitrator. In rejecting this contention, the Court stated:

> "We think that labor disputes of the kind involved here cannot be broken down so easily into their 'substantive' and 'procedural' aspects. Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum: they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it." (376 U.S. at 556-57)

The Court said:

> "Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration. * * * It would be a curious rule which required that intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result.
>
> "*Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.*" (376 U.S. at 557; emphasis added)

Subsequently, in *Operating Engineers* v. *Flair Builders*, (1972) 406 U.S. 487, 32 L.Ed. 2d 248, in which it was contended that a union's arbitration request was barred by laches, this Court again held that time limits were for determination by an arbitrator and not by the Court. After noting that the parties had agreed to arbitrate "any difference" which could not be settled within forty-eight hours of occurrence, the Court stated:

> "There is nothing to limit the sweep of this language or to except any dispute or class of disputes from arbitration. In that circumstance, we must conclude that the parties meant what they said—that 'any difference,' which would include the issue of laches raised by respondent at trial, should be referred to the arbi-

> trator for decision. The District Court ignored the plain meaning of the clause in deciding that issue." (406 U.S. at 491)

The Court further stated:

> "But once a court finds that, as here, the parties are subject to an agreement to arbitrate, and that agreement extends to 'any difference' between them, then a claim that particular grievances are barred by laches is an arbitrable question under the agreement." (406 U.S. at 491-92)

The above decisions of this Court are simply applications of the landmark trilogy decisions. *American Mfg. Co.* and *Warrior & Gulf, supra*, and *Steelworkers* v. *Enterprise Wheel & Car Corp.*, (1960) 363 U.S. 593.

In the instant case, the arbitration agreement between the parties does not employ the words "any difference" but does contain language equally as comprehensive. Section 7.08.03 says, "*All grievances* between the parties as to the interpretation, application or alleged violation of this Agreement * * * shall be subject to arbitration." This is surely as broad as "any difference." Also, in Section 7.01 the parties specifically agree that:

> "If *any question* arises as to whether a particular dispute is or is not a proper subject for a grievance within the meaning of this Section 7.01, the question may be reserved throughout the grievance procedure and be determined, if necessary, by arbitration." (Emphasis added)

"Any question" likewise seems as broad as "any difference."

Finally, and most importantly, in the instant case the parties themselves had specifically agreed in writing that

the arbitrator would hear and decide any question which might arise with respect to "arbitrability" including "timeliness" of compliance with the agreed steps of the grievance procedure. In Section 7.08.04, they agreed that:

> "*Where arbitrability such as timeliness is at issue the arbitrator will hear evidence and argument on that issue first.*" (Emphasis added)

In the instant case, the District Court, in its second decision, affirmed by the Court of Appeals in the second decision of that Court, specifically ordered:

> "That the plaintiff Union and the [defendant] Company proceed to submit the dispute concerning the application and interpretation of the 'Work Schedule' without regard to any contractual time or procedural limitation contained in Article VII of the Collective Bargaining Agreement."

Thus, it will be observed that the trial court did not determine compliance with time limits, and the arbitrator is also directed not to decide this issue.

Section 7.08.03 of the agreement specifically states that:

> "The arbitrator shall not have the power to add to or subtract from or modify this Agreement, or any supplements thereto, in any way whatsoever."

The trial court's order, affirmed by the Sixth Circuit, must be construed as a direction to the arbitrator to "subtract" the "written notice" and the time limit conditions from the agreement. Such an order not only violates the contract and invades the exclusive province of the arbitrator as construed in the above decisions of this Court, but also has obvious constitutional overtones which need not be elaborated further here.

The reason given by the Court of Appeals for this strange result is that "in the course of this lengthy litigation, the period for filing a timely grievance under the agreement expired." Actually, as indicated above, the Union had advised NCR of the Union's decision not to arbitrate *before* the litigation began. Thus, it is simply not true that the period expired "in the course of this lengthy litigation."

Having erroneously decided that the time had expired "during the course" of the litigation, the Court then stated that the District Court "should not allow the Company to foreclose arbitration by asserting that the Union's claim was not timely filed." But under the collective agreement, the employer had bargained for and obtained the clear right to foreclose arbitration whenever demand for arbitration was not in writing and timely filed. The contract, as indicated above, expressly required the arbitrator to honor the language of the contract. Surely the "congressional policy favoring arbitration" or the assumed equities of the case cannot thus destroy the collective agreement of the parties and deprive the arbitrator of his right and duty under the express language of the agreement and the decisions of this Court to decide the notice and time limit issues. In *American Mfg. Co., supra*, this Court stated that:

> "The Courts * * * have no business * * * considering whether there is equity in a particular claim." (363 U.S. at 568)

The decision of the Court below compels arbitration on terms never agreed to by NCR—the arbitration of grievances not duly noticed or timely filed under the express conditions of the arbitration agreement. Also, it invades the arbitrator's exclusive jurisdiction to determine all issues of procedural arbitrability.

2. There Is a Conflict Among the Circuits.

In the instant case, the Sixth Circuit has held that the arbitrator may not decide the issue of "procedural arbitrability" raised by the union's failure to make a timely request for arbitration. The decision conflicts with the decisions in other circuits which, since *Wiley, supra,* have uniformly held that such issues of procedural arbitrability are for the arbitrator and should not be disposed of by the Court. *Tobacco Workers* v. *Lorillard Corp.*, (CA 4; 1971) 448 F. 2d 949. (See cases cited in footnote 9 thereof) Also, in *Trailways, Inc.* v. *Motor Coach Employees,* (CA 1; 1965) 353 F. 2d 180, the Court, in directing arbitration, stated:

> "The Company's contention that the Union failed to file the grievances relating to discharge of the employees within the requisite time limits is without merit. It can raise that defense before the arbitrator but not before this Court. John Wiley & Sons v. Livingston, supra." (353 F. 2d at 182)

The instant case is also clearly at odds with the decision of the Ninth Circuit in *International Association of Machinists* v. *Howmet Corp.*, (CA 9; 1972) 466 F. 2d 1249. The Court, in directing that the arbitrator, and not the Court, should determine the issue of timeliness, stated:

> "The Fourth Circuit has held that the issue of laches, like the issue of compliance with procedural requirements of the collective bargaining agreement, should be considered by the arbitrator, not by the courts."

The Court also rejected the contention that certain issues should be withheld by court order from determination by the arbitrator. The Court stated that:

"* * * we agree that the flexible nature of the arbitration process requires that the arbitrator be given as much freedom as possible—from the framing of the issues themselves to the fashioning of appropriate remedies. The district court's function in the process is essentially ended once it has found the collective bargaining agreement susceptible of an interpretation which would cover the dispute; it should not attempt in the usual case to frame the precise question which the arbitrator must decide. See Avon Products, Inc. v. International Union, United Auto Workers Local 710, 8 Cir., 1967, 386 F. 2d 651, 657, 67 LRRM 2001. *Likewise, the arbitrator should not be foreclosed from passing on the question of arbitrability; the court has merely made the threshold decision that the collective bargaining agreement is susceptible of an interpretation making the dispute arbitrable, i.e., the issue is prima facie arbitrable.* The arbitrator should not be prevented from deciding whether or not he will so interpret the agreement.

"The matter is remanded to the district court with directions to reframe its decree in a manner consistent with this opinion."

CONCLUSION

The Petition for Writ of Certiorari should be granted and the case remanded with directions to dismiss. In the alternative, if the Court should conclude that arbitration was authorized, the Petition should be granted and the case remanded with directions to delete paragraph 2 from the order of the District Court dated January 16, 1973. (App. C, p. A8) *Federal Trade Commission* v. *American Crayon Co.*, (1956) 352 U.S. 806.

Respectfully submitted,

J. MACK SWIGERT
600 Dixie Terminal Building
Cincinnati, Ohio 45202
Attorney for Petitioner

Of Counsel:

B. LYLE SHAFER, ESQ.
RICHARD V. RUNYAN, ESQ.
LAWRENCE J. BARTY, ESQ.

APPENDIX

APPENDIX A

No. 73-1308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NCR EMPLOYEES' INDEPENDENT UNION, ET AL.,
Plaintiffs-Appellees,

v.

THE NATIONAL CASH REGISTER COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Ohio.

Decided and Filed December 18, 1973.

Before: PHILLIPS, Chief Judge, CELEBREZZE and MILLER, Circuit Judges.

PER CURIAM. This appeal questions whether the district court erred when it directed that a labor dispute be submitted to arbitration "without regard to any contractual time or procedural limitation" contained in the collective bargaining agreement. For reasons which we will explain below, we believe that the district court did not commit error.

In January of 1969, the National Cash Register Company executed a collective bargaining agreement with the NCR Employees' Independent Union. Previously the company and the union had agreed to a temporary work schedule which controlled the manner by which the employees would return to their jobs after a strike of several weeks. Subsequently, a dispute arose over whether the company had violated this latter agreement by not scheduling certain employees for overtime during the readjustment period. Not satisfied with the company's response, the union filed suit in February of 1969, in the Common Pleas Court of Montgomery County, Ohio and requested that the court determine the rights of certain employees to have been scheduled for overtime work. The action was later removed to the United States District Court for the Southern District of Ohio.

The company moved for dismissal, contending that the grievance and arbitration procedures of the collective bargaining agreement contained the sole remedy of the union. Consequently the court would be without jurisdic- as one for summary judgment, the district court held that the temporary work schedule was part of the collective bargaining agreement and disputes arising out of its interpretation must follow the course proscribed in the grievance-arbitration procedures. Appeal was then taken by the union to this Court. We reversed and remanded the case because we found that the district court erred in treating the motion for dismissal as one for summary judgment without notifying the parties and affording them the opportunity to present additional evidence. We closed the opinion with the following paragraph and footnote:

> In the event the court proceeds in this manner and again concludes that arbitration is the exclusive remedy on the merits of plaintiffs' claim of violation

> of the "Work Schedule," we think that in the interest of justice and equity the court should direct the parties to proceed to arbitration on the violation issue rather than dismiss the action outright.[1] It follows that if the court should conclude that the plaintiffs' claim is not governed by any arbitration clause, it would then proceed to determine the plaintiffs' claim on the merits.

Upon remand the district court again found that the grievance-arbitration procedure of the collective bargaining agreement was the exclusive remedy of the union. The court ordered that the matter be submitted to arbitration "without regard to any contractual time or procedural limitations contained in Article VII of the Collective Bargaining Agreement." The company now appeals the order on the grounds that the union must follow the entire grievance-arbitration procedure and be subject to the procedural and time limitations contained therein.

This lawsuit was brought in an atmosphere of confusion as to whether the temporary work schedule was a part of the collective bargaining agreement. Since the schedule related only to a limited period and was not executed at the same point in time as the agreement, the union did not act unreasonably when it concluded that the schedule was not incorporated into the agreement and that its remedy was with the courts, not the grievance procedure. Yet in the course of this lengthy litigation, the period for filing a timely grievance under the agreement expired. We were cognizant of this problem when this case was

---

1. The Court in this event should specify the applicable arbitration provision and its order should direct arbitration of the substantive issue without regard to any possible contractual time or other procedural limitations. To enforce its order the Court will retain jurisdiction pending arbitration.

first before the Court and directed that should the district court find that the grievance-arbitration procedure controlled, it should not allow the company to foreclose arbitration by asserting that the union's claim was not timely filed. Had we done otherwise, it would have been at the expense of the well-established congressional policy favoring arbitration as a means of preserving union-management peace. *See United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 567-568 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

Our decision simply means that arbitration remains as a viable means of resolving the dispute. *See generally, Boone* v. *Armstrong Cork Company*, 384 F.2d 285 (5th Cir. 1967).

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-1308

NCR EMPLOYEES' INDEPENDENT UNION, JUNIOR H. HART, FRED L. DUFF AND PAUL B. SCOTT,
Plaintiffs-Appellees,

vs.

THE NATIONAL CASH REGISTER COMPANY,
Defendant-Appellant.

Before: PHILLIPS, Chief Judge, CELEBREZZE and MILLER, Circuit Judges.

JUDGMENT

(Filed December 18, 1973)

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiffs-Appellees recover from Defendant-Appellant, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by Order of the Court

/s/ James A. Higgins
Clerk

APPENDIX B

Section 301(a) of the Labor Management Relations Act, 1947, (29 U.S.C. §185(a), 61 Stat. 156) provides:

> "Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 203(d) of the Labor Management Relations Act, 1947, (29 U.S.C. §173(d), 61 Stat. 154) provides in relevant part:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. * * *"

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CIVIL CASE NO. 3658

NCR EMPLOYEES INDEPENDENT UNION, et al.,
Plaintiff,

-vs-

THE NATIONAL CASH REGISTER COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

January 16, 1973

This is an action brought by the NCR Independent Union and three individual employees against the National Cash Register Company asking this court to determine and declare the rights of production and maintenance employees to be recalled for overtime work on Saturday, December 21, 1968 and Saturday, January 4, 1969 under the terms of a "Work Schedule" agreed upon by the Union and the Company as part of a strike settlement.

In a Memorandum Opinion and Order issued January 11, 1971 this court, treating the defendant Company's motion to dismiss for lack of jurisdiction as a motion for summary judgment concluded that there were no genuine issues of material fact for trial and found that the "Work

Schedule" was an integral part of the Collective Bargaining Agreement and that plaintiffs' exclusive remedy lay under the grievance arbitration procedures of the applicable Collective Bargaining Agreement.

On appeal the United States Court of Appeals for the Sixth Circuit remanded this action for further proceedings and directed that on remand this court give notice of its intention to treat the motion to dismiss as a motion for summary judgment and to afford the parties a reasonable opportunity to present any additional evidence bearing upon the issue of arbitration. Pursuant to the mandate issued by the Sixth Circuit this court by an order issued May 9, 1972 gave notice of its intention to treat the defendant's motion to dismiss as a motion for summary judgment and directed the plaintiff to submit additional evidence within sixty days. In response to this order the plaintiff Union has filed the affidavit of William A. Biggs, former Chairman of the Group Benefits Committee of the NCR Employees' Independent Union, the affidavit of plaintiffs' counsel and various exhibits consisting of the Collective Bargaining Agreement executed January 30, 1969, a copy of one of the eleven supplements to the Agreement which were executed on January 30, 1969 and the Union's index of supplements to the Bargaining Agreement. Supplemental briefs have been filed by both the plaintiff Union and the defendant Company.

Upon careful consideration of the briefs and the additional evidence presented by the plaintiffs the court is unpersuaded that it should depart from its original conclusion that summary disposition of this action is appropriate. The Biggs affidavit and the exhibits submitted therewith do not disclose the existence of genuine issues of material fact for trial. The court does not consider it significant that the "Work Schedule" which is the subject of this

action was not contained in any of the eleven supplements to the formal written Collective Bargaining Agreement executed by the parties on January 30, 1969. The "Work Schedule" was agreed upon by the parties to fix the time for the recall of employees if the strike was settled prior to the first of the year. The "Work Schedule" by its own terms was to be implemented during the period from December 18, 1968 to January 4, 1969. Since the schedule was to be implemented prior to the time of the formal execution of the Bargaining Agreement on January 30, 1969 no utilitarian or practical purpose would have been served by including the "Work Schedule" as a written supplement to the Bargaining Agreement. This court, therefore, reaffirms its original holding that the "Work Schedule" is an integral part of the Collective Bargaining Agreement and that the plaintiffs' exclusive remedy lies under the grievance arbitration procedures of the Bargaining Agreement executed January 30, 1969.

In the event this court again concluded that arbitration was the exclusive remedy on the merits of plaintiffs' claim of violation of the "Work Schedule," the Court of Appeals instructed this court to direct the parties to proceed to arbitration on the violation issue rather than dismiss the action outright. In its brief the defendant Company contends that this court should disregard this instruction from the Sixth Circuit for the reason that an order to arbitrate would be contrary to the interest of justice and equity and further such an order would be contrary to law and beyond the authority of this court. The court does not agree. The directive by the Sixth Circuit that this court order the parties to arbitrate rather than dismiss the action constitutes the "law of this case" and therefore this court is precluded from adopting an approach contrary to that directed by the Court of Appeals.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED:

1. That the plaintiff Union and the defendant Company submit the dispute concerning the application and interpretation of the "Work Schedule" to arbitration as provided for in Article VII of the Collective Bargaining Agreement executed betweeen the parties on January 30, 1969;

2. That the plaintiff Union and the plaintiff Company proceed to submit the dispute concerning the application and interpretation of the "Work Schedule" without regard to any contractual time or procedural limitation contained in Article VII of the Collective Bargaining Agreement.

This court hereby retains jurisdiction over this action pending the submission of the dispute described in this action to arbitration.

/s/ Carl A. Weinman
Chief Judge U.S. District Court